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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

TRAGO INTERNATIONAL, INC., etc.,  
et al.,

Plaintiffs and Respondents,

v.

TYRONE MONTGOMERY et al.,

Defendants and Appellants.

B200878

(Los Angeles County  
Super. Ct. No. YC054317)

APPEAL from orders of the Superior Court of Los Angeles County, Bob T. Hight, Judge. Reversed with directions.

Law Offices of David M. Larkin and David M. Larkin for Defendant and Appellant Tyrone Montgomery.

Law Offices of Richard A. Lucal and Richard A. Lucal for Defendant and Appellant Douglas Lovison.

Roberts Law Group and Steven J. Roberts for Defendant and Appellant George Kosty.

Law Offices of Andrew A. Smits and Andrew A. Smits for Plaintiffs and Respondents.

## INTRODUCTION

Trago International, Inc. and its chairman, Christopher Condon (together, Trago International) brought a lawsuit alleging interference with prospective economic advantage and trade libel based on emails sent by defendants Tyrone Montgomery, Douglas Lovison, and George Kosty to Trago International's employees, and others. Defendants filed special motions to strike the complaint arguing that Trago International's action was a SLAPP suit.<sup>1</sup> The trial court denied the motions. We hold that Trago International's complaint was a SLAPP suit subject to an anti-SLAPP motion to strike. The complaint arose out of an emailed cease-and-desist letter. That cease and desist letter was a communication preparatory to the commencement of litigation and so it was a communication in furtherance of defendants' constitutional right to petition. (Code Civ. Proc., § 425.16, subd. (e)(2).)<sup>2</sup> We further hold that as a matter of law, Trago International cannot meet its burden in opposing the anti-SLAPP motion because the emails are privileged communications. (Civ. Code, § 47, subd. (b).) Accordingly, we reverse the orders with directions.

## FACTUAL AND PROCEDURAL BACKGROUND

### 1. *Trago LP and Trago International*

Trago LP was a British Virgin Islands company. Condon and Lovison were partners in Trago LP. Montgomery, another limited partner, worked for the company. Kosty, also a limited partner in Trago LP, raised capital for the

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<sup>1</sup> "SLAPP is an acronym for 'strategic lawsuit against public participation.' " (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.)

<sup>2</sup> All further statutory references are to the Code of Civil Procedure, unless otherwise noted.

company.<sup>3</sup> Trago LP owned assets, including a patent on a tequila bottle design, and a trademark on the name “Trago.”

Relations between the various partners soured. In late 2004, Condon formed Trago International, Inc., a privately owned company, and installed himself as chairman. In June 2005, Condon arranged for Trago International to purchase certain assets, including the patent and trademark, from Trago LP.

Various of Trago LP’s principals learned of this asset transfer and decided that it had been accomplished in violation of Trago LP’s articles of limited partnership, which articles, they claimed required unanimous consent of all of the limited partners for the sale of a partnership asset.<sup>4</sup> They also disputed that Trago LP received value for the patent and trademark. Lovison observed that while Condon initially claimed that Trago International purchased the assets for \$500,000 in cash, Lovison found later that the amount was actually \$50,000. And, some of the defendants were concerned that Condon had misrepresented his experience.

## *2. The emails*

As the result of this dispute among the partners, on November 1, 2006, Montgomery sent an email (the November 1 email) to Condon and forwarded it to numerous people. The email contained a letter from Montgomery to Condon

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<sup>3</sup> Additional defendants, Arthur Castillo and Philip Soto-Mares, are not parties to this appeal.

<sup>4</sup> Section 6.1 of the May 7, 2003 Articles of Limited Partnership reads: “The management and operation of the Partnership shall be vested exclusively in the General Partner. It shall have the authority and power on behalf and in the name of the Partnership to perform all acts and enter into and perform all contracts and other undertakings which it may deem appropriate to the Partnership’s purposes. Notwithstanding the foregoing, the General Partner shall not without the unanimous consent of all the Limited Partners: (i) do any act in contravention of these Articles; (ii) do any act which would make it impossible to carry on the ordinary business of the Partnership; . . . (iv) possess Partnership property, or

entitled “Assets of Trago International, Inc. a Delaware Corporation,” and read: “Dear Mr. Condon: [¶] The Trago Limited Partnership (Trago LP) articles of limited partnership specifically prohibit the sale or disposition of the assets of the limited partnership without the prior unanimous consent of the Limited Partners.” After quoting from the articles, Montgomery continued, “Since I am aware of at least seven (7) Trago Limited Partners who did not consent to the sale and transfer of Trago LP’s assets to Trago International Inc., you obviously did not obtain unanimous consent to do so. Therefore, the sale and transfer of Trago LP’s assets to Trago International Inc. is in direct violation of the Trago LP articles of limited partnership and is not legitimate. Consequently, Trago International Inc., its investors, employees, managers, consultants, and distributors, should immediately cease the use of the Trago name, Trago tequila bottle, and all other Trago LP assets. [¶] *You have ten (10) days as of the date of this letter to respond before I take legal action against you and Trago International Inc.*” (Italics added.) The email listed the people who were sent copies of the email, and at the very bottom, Montgomery wrote: “And just for the heck of it I blind copied several other individuals, so careful who you lie to, Chris.”

Lovison forwarded the November 1 email to “an influential person in the beverage and spirits industry in San Francisco” who, in turn, on November 2, 2006, transmitted a copy to Condon.<sup>5</sup>

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assign its rights in specific Partnership property, for other than a Partnership purpose . . . .”

<sup>5</sup> Also defendant Castillo dispatched an email on November 1, 2006, to Condon and Trago International’s employees, shareholders, consultants, potential and actual investors, and potential and actual distributors, including all the people who had received Montgomery’s November 1 email, accusing Condon of lacking “good faith and [using] questionable business practices.” Likewise, defendant Soto-Mares sent Condon an email in response to the distribution of Montgomery’s November 1 email, declaring his “outrage” that he had never been contacted about

On November 2, 2006, Kosty transmitted an email to Montgomery's distribution list confirming he had not been asked by Condon to vote on a sale or transfer of intellectual property and assets.

On November 2, 2006, Condon also received an email from Michael Mediano, who had been looking for investors for Trago International. Mediano indicated that he was receiving telephone calls and emails from potential and actual investors about the November 1 email, and needed to confirm the validity of the issue with legal counsel. On November 3, 2006, Condon replied by dispatching a copy of Trago International's complaint in the instant lawsuit.

Finally, on November 9, 2006, Montgomery sent an email to Condon noting that he had obtained a domain name nearly identical to Trago International's only without a hyphen,<sup>6</sup> and observing that the Trago International website had changed, remarking that "Storm clouds, they are brewing!"

### *3. The lawsuits*

Trago International filed the instant lawsuit against defendants. The operative complaint seeks damages for intentional interference with prospective economic advantage, trade libel, libel per se, and breach of contract based on the above-described emails. The complaint alleges that defendants conspired to destroy Trago International by sending the emails to Trago International's employees, shareholders, consultants, investors, and distributors, accusing Trago International and Condon of fraud, criminal conduct, and unethical business practices.<sup>7</sup>

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the asset transfer. Because Castillo and Soto-Mares are not parties to this appeal, we will not address their email communications.

<sup>6</sup> Trago International's domain name was "trago-tequila.com" whereas Montgomery's was "tragotequila.com."

<sup>7</sup> Although Trago International originally filed the lawsuit in Orange County, it dismissed that action and refiled in Los Angeles County in December 2006.

As promised, Montgomery and Lovison filed separate complaints in San Diego County against Condon, Trago International, and Trago LP, among others, in December 2006, seeking damages and equitable relief arising from Condon's alleged violation of the articles of limited partnership and his alleged breach of fiduciary duty and unfair competition.

#### 4. *The special motions to strike*

Montgomery and Lovison, joined by Kosty, brought special motions to strike Trago International's operative complaint. (§ 425.16.) Defendants argued that Trago International's complaint was subject to the special motion to strike because it was filed "in direct retaliation" for the "cease-and-desist email" that Montgomery sent to Trago International and "interested parties." Defendants argued that the November 1 email was a pre-litigation communication, a cease and desist letter, that was followed by the filing of litigation and hence arose from defendants' exercise of their constitutional right to petition. Defendants also asserted that Trago International could not meet its burden of producing competent evidence showing that it would prevail at trial because the emails were absolutely protected by the litigation privilege under Civil Code section 47, subdivision (b).

The trial court denied the motions. The court ruled that defendants failed to establish that Trago International's lawsuit arose from defendants' exercise of their right of petition or free speech in connection with a public issue. Rather, the court reasoned, the statements were made in the context of a private business dispute. Because defendants had not carried their burden, the court explained, the burden never shifted to Trago International to show probability of prevailing on its claim. Lovison, Kosty, and Montgomery filed their timely appeals.

### CONTENTIONS

Appellants contend that the trial court erred in ruling that the statements at issue were not protected petitioning activity. Montgomery contends that the trial court erred in ruling that petitioning activities under section 425.16, subdivision (e)(2) must also be related to an issue of public importance. Lovison and

Montgomery argue that the trial court omitted to assess whether Trago International met its burden in opposing the anti-SLAPP motion and that Trago International presented no competent evidence to demonstrate that it could prevail at trial against Lovison on its claims.

## DISCUSSION

### 1. *The standard of review is de novo.*

Generally speaking, “a SLAPP suit is ‘a meritless suit filed primarily to chill the defendant’s exercise of First Amendment rights.’ [Citation.]” (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 783 (*Dove Audio*).)

To prevent SLAPP suits, section 425.16, subdivision (b)(1) affirms that a “cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (§ 425.16, subd. (b)(1).)

When ruling on an anti-SLAPP motion to strike, the trial court engages in a two-step process. The court first decides whether the defendant has made a prima facie showing that the challenged cause of action is one arising from protected activity because it arises from the exercise of the defendant’s free speech or petition rights. If the court finds that this showing has been made, it then determines whether the plaintiff can demonstrate a probability of prevailing on the claim. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) The plaintiff bears the burden to show the second step, namely, a probability of prevailing in the lawsuit. (*Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, 151.)

We review the trial court's rulings on an anti-SLAPP motion de novo, conducting an independent review of the entire record. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999.)

2. *Trago International's complaint arose from defendants' protected activity.*

Subdivision (e)(2) of section 425.16 defines what constitutes an “ ‘act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue’ ” such as would be protected by the anti-SLAPP special motion to strike. Such acts are: “any written or oral statement or writing made before a . . . judicial proceeding . . .” and “any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law . . .” (§ 425.16, subd. (e)(1) & (2).)

Defendants contend they demonstrated that the conduct by which Trago International claims to have been injured was protected activity, namely, the November 1 email and the ensuing emails. The emails, they argue, were “made in connection with an issue under consideration . . . by a . . . judicial body” (§ 425.16, subd. (e)(2)) because it was sent in good faith anticipation of Montgomery's and Lovison's lawsuits. Trago International counters that its complaint had nothing to do with a statement made in connection with an issue that was actually “*under consideration*” by a judicial body. (§ 425.16, subd. (e)(2), italics added.) We agree with defendants.

Trago International overlooks the glaring fact that the November 1 email transmitted a *cease and desist letter*. As defendants note, Trago International's entire complaint arose from the November 1 email and copies of the November 1 email that were forwarded to interested parties.

Civil Code section 47, subdivision (b)<sup>8</sup> protects participants in judicial proceedings from derivative tort actions based on communications in or about the judicial proceedings. The litigation privilege applies to representations made during lawsuits. What is more important, contrary to Trago International's insistence,<sup>9</sup> the privilege *also applies to* “ ‘statements made prior to the filing of a lawsuit[.]’ [citation]” (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 322), when the prelitigation statement was made in connection with a proposed litigation that is “ ‘contemplated in good faith and under serious consideration.’ [Citation.]” (*Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 36-37; see also *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1058 [privilege applies to “prelitigation communications involving the subject matter of the ultimate litigation”].) Thus, the litigation privilege encompasses “communications preliminary to a proposed judicial proceeding[.]” (*Dove Audio*,

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<sup>8</sup> Civil Code section 47 reads in relevant part: “A privileged publication or broadcast is one made: [¶] . . . [¶] (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law . . . .”

<sup>9</sup> Trago International cites *People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.* (2000) 86 Cal.App.4th 280 at pages 284 to 285, and *Paul v. Friedman* (2002) 95 Cal.App.4th 853, to argue that “an official proceeding must be pending” to cloak a statement with privilege and because no lawsuit was pending at the time the November 1 email was sent, it was not sent “in connection with an issue under consideration or review” by an official body. (§ 425.16, subd. (e)(2).) Trago International's reliance is misplaced. In *People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.*, *supra*, at page 285, the communication involved a demand for performance of an insurance contract and there was only a possibility that the communication might be used in connection with a lawsuit. In contrast, here, the November 1 email threatened imminent litigation that was promptly carried out within six weeks. In the second case, the communications at issue were not privileged because they “extended far beyond the scope of the issues subject to arbitration,” and bore “no relationship to the allegations” in the lawsuit. (*Paul v. Friedman*, *supra*, at p. 866.) That is clearly not the case here as the cease and desist letter here was based on the very same allegations Montgomery and Lovison raised in their complaints.

*supra*, 47 Cal.App.4th at p. 781 [demand letter protected]; *Aronson v. Kinsella* (1997) 58 Cal.App.4th 254, 260 [same].)

Therefore, our Supreme Court confirmed that “ ‘[j]ust as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b) [citation], . . . such statements are equally entitled to the benefits of section 425.16.’ [Citations.]” (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115, quoting from *Dove Audio, supra*, 47 Cal.App.4th at p. 784; see also *Flatley v. Mauro, supra*, 39 Cal.4th at p. 322, fn. 11.)

In *Briggs*, among the relevant communicative acts at issue was counseling a tenant in anticipation of litigation against the tenant’s landlord. (*Briggs v. Eden Council for Hope & Opportunity, supra*, 19 Cal.4th at pp. 1114-1115.) That conduct was held to be sheltered by the anti-SLAPP statute. (*Id.* at p. 1115.)

Likewise, in *Dove Audio*, the protected communication was a letter sent by a law firm to prospective plaintiffs seeking endorsement for a planned complaint to be filed with the State Attorney General’s office about the defendant’s alleged underpayment of royalties to designated charities. (*Dove Audio, supra*, 47 Cal.App.4th at p. 780.) *Dove Audio* held that the letter was entitled to the protection of section 425.16 because it was an “act in furtherance of [the law firm’s] constitutional right of petition.” (*Dove Audio, supra*, at p. 784; see also *Blanchard v. DIRECTV, Inc.* (2004) 123 Cal.App.4th 903, 918 [plaintiffs conceded their lawsuit arose from defendant’s free speech activity where entire lawsuit premised on defendant’s demand letter, sent in advance of, or to avoid litigation]; compare *Moore v. Shaw* (2004) 116 Cal.App.4th 182, 197 [attorney’s conduct in drafting a termination agreement to a trust not an act in furtherance of the right to petition where agreement was drafted nearly three years before any lawsuit was filed].)

In *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, an employer brought a contract and trade secrets action against a former employee. The employee cross-claimed that a letter sent by the employer's lawyer before filing the lawsuit to customers was defamatory. Citing *Briggs*, *Neville* held that it made no difference to the outcome that the letter had been sent before the employer brought the lawsuit against the former employee. (*Id.* at p. 1268, citing *Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1537 [protection of § 425.16 “ ‘applies not only to the filing of lawsuits, but extends to conduct that relates to . . . litigation, including statements made in connection with or in preparation of litigation’ ”].) *Neville* stated: “This position reflects that ‘courts have adopted “a fairly expansive view of what constitutes litigation-related activities within the scope of section 425.16.” [Citation.]’ [Citation.] Accordingly, although litigation may not have commenced, if a statement ‘concern[s] the subject of the dispute’ and is made ‘in anticipation of litigation “contemplated in good faith and under serious consideration,” ’ [citations] then the statement may be petitioning activity protected by section 425.16.” (*Neville v. Chudacoff, supra*, at p. 1268.)

Here, defendants' communication, the November 1 email, transmitted a cease and desist letter notifying Trago International and Condon of defendants' intention to file a lawsuit if Condon did not cease using the Trago trade name, the patented Trago tequila bottle, and other Trago LP assets. It and the ensuing emails were made in good faith anticipation of two lawsuits. Declarations filed by defendants' attorneys show that Montgomery's complaint was drafted in August 2006, before he sent the November 1 email and both his and Lovison's complaints were filed within six weeks of the November 1 email. The emails' cease and desist letter concerns the subject of the dispute raised in Lovison's and Montgomery's complaints. As the November 1 email and its progeny were directly connected to proposed litigation that was contemplated in good faith and under serious consideration, the emails were privileged and likewise “ ‘entitled to

the benefits of section 425.16' ” (*Briggs v. Eden Council for Hope & Opportunity, supra*, 19 Cal.4th at p. 1115), as defendants’ acts in furtherance of their constitutional right of petition. Trago International’s complaint arises from the November 1 email and its progeny. Therefore, Trago International’s complaint was a SLAPP suit. (§ 425.16; *Dove Audio, supra*, 47 Cal.App.4th at p. 784.)

The November 1 and ensuing email are protected acts under section 425.16, notwithstanding the email were sent to private parties rather than asserted in a complaint filed in court. (*Dove Audio, supra*, 47 Cal.App.4th at p. 784.) *Neville* rejected the employee’s contention that the offending communication was not protected because it was sent to the employer’s customers, against whom the employer had no claim, instead of to the employee. (*Neville v. Chudacoff, supra*, 160 Cal.App.4th at p. 1270.) The *Neville* court explained that section 425.16, subdivision (e)(2) “has been held to protect statements to persons who are not parties or potential parties to litigation, provided such statements are made ‘in connection with’ pending or anticipated litigation. [Citations.]” (*Neville, supra*, at p. 1270.)

Here, the emails were directed to Trago LP’s employees, shareholders, consultants, potential investors, investors, potential distributors and distributors, all of whom defendants reasonably could believe had an interest in the dispute either as intentional or as unwilling participants in Condon’s misconduct, or as potential witnesses to it. By the emails, defendants were attempting to mitigate Trago LP’s potential damage and prevent further misuse of Trago LP’s proprietary information and trademarks. The aim of the cease and desist letter contained therein was to put a stop to the conduct or resolve the dispute in lieu of litigation. (*Neville v. Chudacoff, supra*, 160 Cal.App.4th at p. 1268.) The emails were related directly to defendants’ claims of misappropriation of Trago LP’s assets, violating the articles of limited partnership, and unfair competition that formed the basis of Montgomery’s and Lovison’s lawsuits against Trago International.

Where the emails were sent “in connection with” the issues in those lawsuits, the statements were protected under section 425.16. (*Neville, supra*, at p. 1268.)

Trago International contends that this case involves a private matter to which the anti-SLAPP statute does not apply. The contention is unavailing. Kosty is correct that the trial court here erred as a matter of law in ruling that the statements, i.e., the emails, made before, or in connection with an issue under consideration in an official proceeding (§ 425.16, subd. (e)(1) & (2)), also had to be related to an issue of public importance. The Supreme Court held that section 425.16, subdivision (e)(1) and (2), which protects statements made before, or in connection with, an official proceeding, does not also require that the statements concern an issue of public significance. (*Briggs v. Eden Council for Hope & Opportunity, supra*, 19 Cal.4th at pp. 1113, 1115; see also *Neville v. Chudacoff, supra*, 160 Cal.App.4th at p. 1261.) For the reasons stated above, Trago International’s complaint was a SLAPP suit.

3. *Trago International cannot carry its burden of producing competent evidence showing that they would prevail at trial.*

Turning to the second prong of the anti-SLAPP analysis, once defendants as the party moving to strike the complaint made their threshold showing, the burden shifted to Trago International to establish a probability of prevailing at trial. The litigation privilege is also relevant to this prong in that it can provide a substantive defense that a plaintiff must overcome when demonstrating a probability of prevailing. (*Flatley v. Mauro, supra*, 39 Cal.4th at p. 323; see, e.g., *Dove Audio, supra*, 47 Cal.App.4th at pp. 784-785 [defendant’s prelitigation communication was privileged and trial court properly granted anti-SLAPP motion to strike]; *Blanchard v. DIRECTV, Inc., supra*, 123 Cal.App.4th at pp. 918-922 [plaintiffs cannot demonstrate probability of prevailing because plaintiffs’ lawsuit barred by litigation privilege].)

Trago International failed to and cannot shoulder its burden. As we explained, *supra*, the November 1 email its progeny were absolutely privileged

under Civil Code section 47, subdivision (b). That privilege is therefore applicable to all of the causes of action alleged by Trago International because its entire complaint is based on the emails. Trago International and Condon cannot demonstrate that they could overcome the litigation privilege. (*Dove Audio, supra*, 47 Cal.App.4th at pp. 784-785; *Blanchard v. DIRECTV, Inc., supra*, 123 Cal.App.4th at pp. 918-922.) Because Trago International's complaint arose from defendants' protected activity and because Trago International cannot demonstrate that it would prevail at trial, the trial court here erred in denying the special motion to strike.

#### DISPOSITION

The order is reversed and remanded to the trial court to enter judgment for appellants and to entertain motions for attorney's fees and costs of appeal pursuant to Code of Civil Procedure section 425.16, subdivision (c).

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.